Supreme Court, U.S.
FILED
MAR 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

87-1522

No. .....

In The
Supreme Court of the United States
October Term, 1987

—o—

RICHARD KOONTZ AND
BARBARA ANN KOONTZ, ADMINISTRATORS
OF THE ESTATE OF
STEVEN KOONTZ, DECEASED,

Petitioners,

v.

INTERNATIONAL HARVESTER COMPANY,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—o—

THOMAS P. PRESTON
(Counsel of Record)
WAYNE A. MACK, JR.

DUANE, MORRIS & HECKSCHER
1500 One Franklin Plaza
Philadelphia, PA 19102
(215) 854-6237

Attorneys for Petitioners

March 11, 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Does the due process clause of the United States Constitution preclude a forum court from applying its own procedural law to a lawsuit properly instituted against a defendant conducting business in the state, where the cause of action arose outside the forum state, as to which the court of appeals are in conflict?

2. Whether a federal district court, following transfer of venue under 28 U.S.C. § 1404(a) for the convenience of parties and witnesses, is free to reject the choice of law rules of the transferor state and dismiss a timely instituted action based upon the procedural law of the transferee state, as to which the court of appeals are in conflict?

LIST OF PARTIES

This petition is being filed on behalf of Richard Koontz and Barbara Ann Koontz, Administrators of the Estate of Steven Koontz, deceased.

The respondent before this Court is International Harvester Company, now known as Navistar International Transportation Corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	9
I. THE THIRD CIRCUIT'S RULING CONCERNING THE CONSTITUTIONALITY OF A FORUM COURT'S APPLICATION OF ITS OWN PROCEDURAL LAW UNNECESSARILY CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS	9
II. THE THIRD CIRCUIT'S RULING CONCERNING THE CONSTITUTIONALITY OF A FORUM COURT'S APPLICATION OF ITS OWN PROCEDURAL LAW IMPROPERLY CONFLICTS WITH THE DECISIONS OF THIS COURT	13
A. The Third Circuit's Ruling Conflicts With This Court's Decisions Upholding The Rule Of Lex Fori	13
B. The Third Circuit's Ruling Conflicts With This Court's Decisions Under The Full Faith And Clause And The Due Process Clause	17
C. The Third Circuit's Ruling Conflicts With This Court's Decisions Regarding The Purpose And Effect Of A Transfer Under 28 U.S.C. § 1404(a)	20

TABLE OF CONTENTS—Continued

Page

D. The Third Circuit's Ruling Conflicts With This Court's Decisions Requiring Uniformity Between Federal Courts And State Courts Sitting In The Same State 23

CONCLUSION 25

APPENDIX 1a

TABLE OF AUTHORITIES

Page

CASES:

Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981) 16, 18, 20

Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945) 15

Clay v. Sun Insurance Office Ltd., 363 U.S. 207 (1960) 19

Cowan v. Ford Motor Co., 694 F.2d 104 (5th Cir. 1982) 10, 13

Cowan v. Ford Motor Co., 713 F.2d 100 (5th Cir. 1983) 10, 11

Cowan v. Ford Motor Co., 719 F.2d 785 (5th Cir. 1983) 5

Ellis v. Great Southwestern Corp., 646 F.2d 1099 (5th Cir. 1981) 8

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 24, 25

Ferens v. Deere & Co., 819 F.2d 423 (3d Cir. May 28, 1987), *pet. for cert. filed*, 56 U.S.L.W. 3249 (U.S. Sept. 21, 1987) (No. 87-477) 2, 7, 8, 9, 10, 16, 20

Goad v. Celotex Corp., 831 F.2d 508 (4th Cir. 1987) 12, 13

Gonzalez v. Volvo of America Corp., 734 F.2d 1221 (7th Cir. 1984), *amended on other grounds*, 752 F.2d 295 (7th Cir. 1985) 8

Great Western Telephone Co. v. Purdy, 162 U.S. 329 (1896) 14

Guaranty Trust Co. v. York, 326 U.S. 99 (1945) 24

Headrick v. Atchison T. & S.F.R. Co., 182 F.2d 305 (10th Cir. 1950) 11, 22, 23

Home Insurance Co. v. Dick, 281 U.S. 397 (1930) 15, 16

TABLE OF AUTHORITIES—Continued

Page

Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941) 8, 24

Louisiana & Mississippi R. Transfer Co. v. Long, 159 Miss. 654 (1930) 5, 10, 24

M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312 (1839) 14

Martin v. Stokes, 623 F.2d 469 (6th Cir. 1980) 8

Mayo Clinic v. Kaiser, 383 F.2d 653 (8th Cir. 1961) 8

McVicar v. Standard Insulations, Inc., 824 F.2d 920 (11th Cir. 1987) 12

Nelson v. International Paint Co., 716 F.2d 640 (9th Cir. 1983) 8

Order of United Commercial Travelers of America v. Wolfe, 331 U.S. 586 (1947) 15

Perkins v. Benquet Consolidated Mining Co., 342 U.S. 437 (1952) 10, 18

Poole v. Mississippi Publishers Corp., 208 Miss. 364, 44 So.2d 467 (1950) 19

Roofing & Sheet Metal Services, Inc. v. LaQuinta Motor Inns, Inc., 689 F.2d 982 (11th Cir. 1982) 8

Schreiber v. Allis-Chalmers Corp., 611 F.2d 790 (10th Cir. 1979) 11

Van Dusen v. Barrack, 376 U.S. 612 (1964) ..... *passim*

Wells v. Simonds Abrasive Co., 364 U.S. 514 (1953) 15, 17

White v. Malone Properties, Inc., et al., No. 55, 195, slip op. (Miss. March 12, 1986), *withdrawn*, 494 So.2d 5766 (Miss. September 24, 1986) 5, 6, 7

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 18

TABLE OF AUTHORITIES—Continued

	Page
CONSTITUTIONAL PROVISIONS:	
U.S. Const. art. IV, § 1	3
U.S. Const. amend. XIV, § 1	3
STATUTES:	
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	4
28 U.S.C. § 1332	4
28 U.S.C. § 1404(a)	*passim*
42 Pa. Cons. Stat. Ann. § 5524(2)	3, 5
Miss. Code Ann. § 15-1-49	3, 5
Miss. Code Ann. § 29-1-27	4, 19

No. .....

—o—

In The

Supreme Court of the United States

October Term, 1987

—o—

RICHARD KOONTZ AND
BARBARA ANN KOONTZ, ADMINISTRATORS
OF THE ESTATE OF
STEVEN KOONTZ, DECEASED,

Petitioners,

v.

INTERNATIONAL HARVESTER COMPANY,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—o—

Petitioners, Richard Koontz and Barbara Ann Koontz, Administrators of the Estate of Steven Koontz, deceased, respectfully pray that a writ of certiorari issue to review the judgment-order of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on December 15, 1987.

—o—

OPINIONS BELOW

The judgment-order of the Court of Appeals for the Third Circuit is unreported. A copy of the court of appeal's judgment-order appears in the Appendix to this petition at 1a. The order of the District Court for the Eastern District of Pennsylvania is also unreported. A copy of the district court's order appears in the Appendix to this petition at 3a.

The express basis for both the court of appeal's judgment-order and the district court's order, *Ferens v. Deere & Co.*, is reported at 819 F.2d 423 (3d Cir. 1987). A petition for a writ of certiorari was filed in *Ferens* on September 21, 1987 and is reported at 56 U.S.L.W. 3249 (U.S. September 21, 1987) (No. 87-477).

o

JURISDICTION

The judgment-order of the United States Court of Appeals for the Third Circuit was entered on December 15, 1987. This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

o

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. art. IV, § 1

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.

28 U.S.C. § 1404(a)

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Miss. Code Ann. § 15-1-49 (1972)

> All actions for which no period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after.

42 Pa. Cons. Stat. Ann. § 5524 (Purdon 1981)

> The following actions and proceedings must be commenced with two years:
>
> * * *
>
> (2) an action to recover damages for injuries to the person or for the death of an individual caused by the

wrongful act or neglect or unlawful violence of another.

Miss. Code Ann. § 29-1-27 (1972)

Any corporation claiming existence under the laws of any other state or of any other country foreign to the United States, found doing business in this state, shall be subject to suit here to the same extent that corporations of this state are, whether the cause of action accrued in this state or not.

———o———

STATEMENT OF THE CASE

This is a products liability action which was instituted in the District Court for the Northern District of Mississippi on May 15, 1985.[1] After respondent answered the Complaint and discovery motions were filed, the court transferred the action to the District Court for the Eastern District of Pennsylvania.[2]

In their Complaint, petitioners allege that respondent International Harvester Co. ("International Harvester") is strictly liable for certain design defects and defective conditions in a 1977 International Harvester Scout vehicle which caused the vehicle to overturn and burst into flames on June 9, 1979. This accident occurred in Pennsylvania.

---

1 The jurisdiction of the district court was invoked under 28 U.S.C. § 1332 because of diversity of citizenship; the plaintiffs being citizens of Pennsylvania and the defendant a citizen of Illinois. On appeal, jurisdiction was vested in the court of appeals pursuant to 28 U.S.C. § 1291.

2 The Mississippi court transferred the action following petitioners' motion pursuant to 28 U.S.C. § 1404(a).

Petitioners' son, Steven Koontz, was fatally injured in the accident, as was the driver of the vehicle.

International Harvester is a nationwide corporation that regularly conducts business, and is registered to do business in the State of Mississippi. International Harvester has a registered agent for service of process in Mississippi, who accepted service of the Complaint.

Under prevailing Mississippi law, petitioners' action was timely instituted since it was brought against International Harvester within six years of the time the cause of action arose. *See* Miss. Code Ann. § 15-1-49 (1972). For over 150 years, Mississippi courts and federal courts applying Mississippi law have repeatedly held that the Mississippi six-year statute of limitations is procedural and, thus, applies to lawsuits brought by non-resident plaintiffs against defendants, such as International Harvester, who qualify to do business in the state, even though the cause of action arose in another state. *See, e.g., Louisiana & Mississippi R. Transfer Co. v. Long*, 159 Miss. 654 (1930); *Cowan v. Ford Motor Co.*, 719 F.2d 785 (5th Cir. 1983).[3]

On March 12, 1986, the Mississippi Supreme Court rendered a decision which appeared to jeopardize the continued applicability of this Mississippi rule. In *White v. Malone Properties, Inc., et al.*, No. 55, 195, slip op. (Miss. March 12, 1986), *withdrawn*, 494 So. 2d 5766 (Miss. September 24, 1986), the Mississippi Supreme Court held that a worker's compensation claim brought in a Mississippi

---

[3] Under Pennsylvania law, petitioners' action was time barred since it was instituted outside the two year period imposed by 42 Pa. Cons. Stat. Ann. § 5524(2).

court based upon a cause of action arising wholly within Louisiana, was controlled by the Louisiana Worker's Compensation Act. The Louisiana Act contained an exclusiveness of liability clause and a two-year statute of limitations.

Immediately following the March 12, 1986 *White* opinion, a Petition for Rehearing of the decision was filed in the Mississippi Supreme Court. While the resolution of that petition was pending, the District Court for the Eastern District of Pennsylvania *sua sponte* dismissed petitioners' action without prejudice on April 29, 1986. This dismissal was expressly based on the March 12, 1986 *White* opinion that was under reconsideration by the Mississippi Supreme Court *en banc*. The district court concluded that *White* held that "where a claim arose factually in another state, the statute of limitations of the other state applies even though the six-year statute of limitations for tort actions in Mississippi would allow the action if it arose in Mississippi."[4]

On September 24, 1986, the Mississippi Supreme Court withdrew its March 12, 1986 opinion in *White* and entered an entirely new opinion. In the new *White* opinion the court stated that it did not "*in any manner disturb*" its prior holdings mandating the application of the Mississippi six-year statute of limitations to lawsuits brought in Mississippi courts based upon causes of action arising out of state. *White v. Malone Properties, Inc., et al.*, 494

---

[4] A copy of the district court's April 12, 1986 order appears in the appendix at 4a.

So. 2d 576, 579 (Miss. September 24, 1986) (emphasis added).[5]

Based upon these extraordinary circumstances, petitioners filed a motion under Fed. R. Civ. P. 60 with the district court to have their original, timely Complaint against International Harvester revived so that it could be decided on its merits. Following the hearing on the motion, and while this case was awaiting decision by the district court, the Third Circuit entered its opinion in *Ferens v. Deere & Co.*, 819 F.2d 423 (3d Cir. May 28, 1987), *pet. for cert. filed*, 56 U.S.L.W. 3249 (U.S. Sept. 21, 1987) (No. 87-477).

Ferens is a case strikingly similar to this case. As here, *Ferens* originated in Mississippi and was transferred to Pennsylvania. Although the action was timely instituted under Mississippi law, the Pennsylvania district court dismissed the action on the ground that it was untimely under Pennsylvania law.

On appeal, the Third Circuit in *Ferens* acknowledged that this Court's prior holdings established that a transfer under 28 U.S.C. § 1404(a) does not result in a change of law. *Ferens*, 819 F.2d at 425 (citing *Van Dusen v. Bar-*

---

[5] In the new opinion, the court indicated that the action in *White* was barred because the Louisiana Worker's Compensation Act contained an exclusiveness of liability clause, and not because the Louisiana statute of limitations was applicable.

rack, 376 U.S. 612 (1964)).[6] The court also admitted that following transfer from one federal court to another, the transferee court must sit as a court of the transferor state and apply its choice of law rule. *Id.*[7]

Notwithstanding the clear language of *Van Dusen*, however, the Third Circuit in *Ferens* held that the law of the transferee state, Pennsylvania, controlled. The basis of this holding was the court's conclusion that a Mississippi court could not constitutionally apply the Mississippi six year statute of limitations in a lawsuit involving a cause of action arising out of state. 819 F.2d at 427.

The Honorable Collin J. Seitz vigorously dissented in *Ferens*. Judge Seitz argued that the majority ignored the traditional distinction between the constitutional limitations on a forum's choice of substantive law and a forum's application of its procedural law. *Id.* at 428. Therefore,

---

6 The Third Circuit rejected the contention, also advanced by International Harvester in this case, that the application of the law of the transferor or transferee state should depend on whether the defendant or plaintiff moved for transfer. 819 F.2d at 426 n.4. *Accord Mayo Clinic v. Kaiser*, 383 F.2d 653, 656 (8th Cir. 1961); *Martin v. Stokes*, 623 F.2d 469, 492 (6th Cir. 1980); *Roofing & Sheet Metal Services, Inc. v. LaQuinta Motor Inns, Inc.*, 689 F.2d 982, 991 n.14 (11th Cir. 1982); *Gonzalez v. Volvo of America Corp.*, 734 F.2d 1221, 1223-24 (7th Cir. 1984), *amended on other grounds*, 752 F.2d 295 (7th Cir. 1985). *Cf. Ellis v. Great Southwestern Corp.*, 646 F.2d 1099, 1108-11 (5th Cir. 1981); *Nelson v. International Paint Co.*, 716 F.2d 640, 643 (9th Cir. 1983). This was a question arguably left open by the Supreme Court in *Van Dusen*. *See id.* at 639-40.

7 Under *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 318 U.S. 487 (1941), a federal district court sitting in diversity must apply the choice of law rule of the state in which it sits.

the Third Circuit had usurped the legislative process and judicially imposed "a federal choice of law rule." *Id.* at 429.

On June 4, 1987, the district court denied petitioners' motion for relief solely on the basis of *Ferens*. On appeal, and after denying petitioners' motion to hear the appeal in banc, the Third Circuit summarily affirmed the district court's order denying petitioners' motion for relief. Again, the court's order cited only the *Ferens* opinion.

———o———

REASONS FOR GRANTING THE WRIT

I.

THE THIRD CIRCUIT'S RULING CONCERNING THE CONSTITUTIONALITY OF A FORUM COURT'S APPLICATION OF ITS OWN PROCEDURAL LAW UNNECESSARILY CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS.

This petition directly calls into question the validity of a holding by the Third Circuit on a constitutional issue of exceptional significance. That issue substantively impacts the rights of countless litigants, including the petitioners in this case. The question, previously addressed by this Court, is whether the United States Constitution precludes a forum court from applying its own procedural law to a lawsuit brought against a defendant conducting business in the state where the cause of action arose outside the state. The Third Circuit stands alone in its con-

clusion that such an application of procedural law is prohibited.

In addition to creating a rule of law conflicting with the decisions of this Court, the Third Circuit has created a rule which is in conflict with the decisions of four other federal appellate courts. This conflict raises significant problems within the federal court system.

The issue which the Third Circuit ruled on in *Ferens*, and of necessity in this case, was whether a *Mississippi court* could constitutionally apply the Mississippi six year statute of limitations. Remarkably, despite the fact the Third Circuit was analyzing what it believed a Mississippi court could do, it conducted its analysis without even mentioning the binding Fifth Circuit precedent on the issue.

In *Cowan v. Ford Motor Co.*, 694 F.2d 104 (5th Cir. 1982) (*"Cowan I"*), and *Cowan v. Ford Motor Co.*, 713 F.2d 100 (5th Cir. 1983) (*"Cowan II"*), the Fifth Circuit addressed the constitutionality of a Mississippi court's application of the Mississippi statute, in a case brought by a non-resident plaintiff, based on a cause of action arising out of state. The defendant in *Cowan*, like respondent, conducted business in Mississippi and appointed an agent for service of process in Mississippi. The Fifth Circuit concluded that the application of the Mississippi statute of limitations to the action was constitutional on the following grounds:

> *First*, the court relied on *Perkins v. Benquet Consolidated Mining Co.*, 342 U.S. 437 (1952), where the Court held that due process was not violated by application of the forum's law to a cause of action arising out of state. *Cowan I*, 694 F.2d at 106-7.

Second, the court stated that the sovereign state of Mississippi had a "recognizable interest" in such cases. 694 F.2d at 107.

Third, the court noted the well-established distinction between the constitutional limitations on the choice of substantive law, as opposed to procedural rules, such as statutes of limitations. *Id.*

Finally, the Fifth Circuit concluded that this Court's "enthusiastic endorsement" and explicit approval of a case involving the identical issue, *Headrick v. Atchison, T. & S.F.R. Co.,* 182 F.2d 305 (10th Cir. 1950), in *Van Dusen, supra,* indicated that the Supreme Court "saw no constitutional due process problem" in such cases. *Cowan II,* 713 F.2d at 104.

Likewise, the Tenth Circuit has also ruled on this issue. In *Schreiber v. Allis-Chalmers Corp.,* 611 F.2d 790 (10th Cir. 1979), a Kansas plaintiff sued in the federal district court in Mississippi on a products liability cause of action which arose in Kansas. The suit was brought after the Kansas statute of limitations had expired, but before the expiration of the Mississippi statute. The Mississippi court transferred the action under 28 U. S. C. § 1404(a) to a Kansas federal court. The Kansas court refused to apply the Mississippi statute of limitations and dismissed.

On appeal, the Tenth Circuit reversed holding that a Mississippi court would follow its long-adhered to rule that in a proceeding in a Mississippi court, Mississippi procedural law, including the six year statute of limitations, governs. 611 F.2d at 794. The court admitted that perhaps, there was a "degree of incongruity" to the result, but cautioned as follows:

> [I]t is axiomatic that hard cases make bad law. We think it preferable to adhere to accepted legal principles rather than to strive to achieve, at the expense of those principles, a result which might appear to some as being more fair and just than the alternative.

Id.

A similar result was reached by the United States Court of Appeals for the Eleventh Circuit in *McVicar v. Standard Insulations, Inc.*, 824 F.2d 920 (11th Cir. 1987). There the court held, contrary to the Third Circuit, that the longer Mississippi statute would apply following transfer under 28 U.S.C. § 1404(a) to a federal court in Florida.

The Fourth Circuit also recently adopted this position in a carefully reasoned opinion, *Goad v. Celotex Corp.*, 831 F.2d 508 (4th Cir. 1987). In *Goad*, the Fourth Circuit rejected a constitutional due process challenge to the lex fori rule. As in this case, the only contact the litigation in *Goad* had with the initial forum was that the defendant conducted business in the state. The court held that this "contact" satisfied due process, noting the well-established distinction between the constitutionality of the application of substantive and procedural law. *Id.* at 510-11. In addition, the Fourth Circuit held that "the heart of due process" was not violated since there was no unfair surprise to the defendant which conducted business in the state and had every reason to expect the longer statute of limitations could be applied to it. *Id.* at 513.

Thus, the Third Circuit's ruling stands in conflict with the decisions of the Fourth, Fifth, Tenth and Eleventh Circuits. A conflict of this magnitude creates dramatic problems within the federal court system. These problems are not confined to cases initially filed in Mis-

sippi, but involve cases filed in any state where plaintiffs enjoy the benefit of an extended statute of limitations.

For example, if a case identical to the instant case is filed in a Mississippi federal court or other federal court of a state with a longer statute of limitations and remains there, the longer statute of limitations will be applied and the action will proceed. *See, e.g., Cowan I*, 694 F.2d at 107. Similarly, if a motion to transfer pursuant to 28 U.S.C. § 1404(a) is granted, and the action is transferred to the Fourth, Fifth, Tenth or Eleventh Circuits, the longer statute will apply and the action will proceed. *See, e.g., Goad*, 831 F.2d. at 513. However, if the case is transferred to the Third Circuit, the longer statute will not apply and the case will be dismissed.

Accordingly, the conflict among the circuits creates the possibility of completely different results in the identical cases instituted in the identical court. For this reason alone, certiorari should be granted.

II.

THE THIRD CIRCUIT'S RULING CONCERNING THE CONSTITUTIONALITY OF A FORUM COURT'S APPLICATION OF ITS OWN PROCEDURAL LAW IMPROPERLY CONFLICTS WITH THE DECISIONS OF THIS COURT.

A.

The Third Circuit's Ruling Conflicts With This Court's Decisions Upholding The Rule Of Lex Fori.

It is not surprising that four of the five circuit courts to rule on this issue have reached the result they did. For hundreds of years, dating back to medieval times,

courts have traditionally relied upon forum law to deal with the procedural aspects of the litigation. This application of forum procedural law by a forum state court has been held to be constitutional regardless of where the cause of action arose.

As early as 1839, this Court stated that it was "well settled" that statutes of limitation were a matter of remedy "and consequently that the lex fori must prevail." *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 327 (1839). The Court reasoned that a statute of limitations:

> is a thing of policy, growing out of the experience of its necessity; and the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every nation, in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction.

Id.

Although the due process clause of the fourteenth amendment, unlike article IV's full faith and credit clause, was not a part of the Constitution at the time of *M'Elmoyle*, the rule has been consistently followed since the adoption of the amendment. For example, in *Great Western Telephone Co. v. Purdy*, 162 U.S. 329 (1896), the Court, citing *M'Elmoyle*, stated:

> The limitation of actions is governed by the lex fori, and is controlled by the legislation of the state in which the action is brought, as construed by the highest court of that state, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions.

Id. at 339.

In *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), this Court again noted that "in the absence of a contractual provision, the local statute of limitations may be applied to a right created in the other jurisdiction even where the remedy in the latter is barred." *Id.* at 409. Likewise, in *Order of United Commercial Travelers of America v. Wolfe*, 331 U.S. 586 (1947), the Court recognized that the rule was "well established and constitutional." *Id.* at 607-09. The Court reiterated this point in *Wells v. Simonds Abrasive Co.*, 364 U.S. 514 (1953), where it noted its approval of the "well-established rule that the forum state is permitted to apply its own period of limitations." *Id.* at 516-17.

The basis for the Court's recognition of the constitutionality of the traditional lex fori rule was expressed in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945). There the Court held that statutes of limitation are traditionally matters of forum state policy established by the legislature after weighing the state's interest in eliminating stale claims:

> Statutes of Limitation find their justification in necessity and convenience rather than logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about a privilege to litigate. Their

> shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual.

Id. at 314 (citation and footnote omitted).

The Third Circuit's position on this issue, expressed in *Ferens* and this case, stands counter to this long line of decisions. Indeed, the Third Circuit in its haste to subject a court's application of a forum's statute of limitations to constitutional analysis, failed to even discuss the well established distinction between procedural and substantive law. Instead, the court erroneously relied on two cases, *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981), and *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), for the proposition that a particular state's statute of limitations may not be applied constitutionally to a defendant conducting business in the state where the cause of action arose outside the state.

In taking this aberrational position, however, the Third Circuit failed to note that *Hague* and *Dick* do not overrule or set aside this Court's prior holdings regarding the traditional lex fori rule. In fact, the cases explicitly address only the constitutionality of the application of *substantive* law, as distinguished from procedural law.[8]

---

[8] For example in *Hague*, the Court stated:

> [F]or a state's *substantive* law to be selected in a constitutionally permissible manner, that state must have a significant contact or a significant aggregation of contacts, creating state interest, such that choice of its laws in neither arbitrary nor fundamentally unfair.

449 U.S. at 313 (emphasis added). Moreover, in *Dick*, the Court distinguished the case before it which involved an

(Continued on following page)

Therefore, the Third Circuit's rejection of the traditional rule is directly contrary to the position of this Court.

B.

The Third Circuit's Ruling Conflicts With This Court's Decisions Under The Full Faith And Clause And The Due Process Clause.

The Third Circuit's ruling not only runs contrary to this Court's prior decisions on the rule of lex fori, but also to the Court's numerous decisions regarding the limitations imposed by the full faith and credit clause and the due process clause of the fourteenth amendment.

There is simply no authority to support the theory that the full faith and credit clause limits the ability of a forum state to apply its own statute of limitations to a cause of action arising in another state. To the contrary, this Court has explicitly decided that "the Full Faith and Credit Clause does not compel the forum state to use the period of limitations of a foreign state." *Wells, supra,* 345 U.S. at 517.

Similarly, the due process clause and its minimum contacts analysis do not limit a forum's application of its own procedural law. The Court has explained that the minimum contacts analysis embodies a concern for

---

(Continued from previous page)

attempt to apply Texas substantive law to a contractual limitation on the period in which the parties could sue, from a case in which the forum simply applied its procedural statute of limitations. 281 U.S. at 409-10. The court stated that "in the absence of a contractual provision, the local statute of limitations may be applied to a right created in the other jurisdiction even where the remedy in the latter is barred." *Id.* at 409.

reasonableness and fairness to defendants. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292-93 (1980). A corporation purposefully availing itself of the privilege to conduct business within a state has clear notice that it is subject to suit in that state and to the application of that state's laws. *Id.* at 298.

Indeed, this precise issue was addressed by the Court in *Perkins v. Benquet Consolidated Mining Co.*, 342 U.S. 437 (1952). In that case, a non-resident plaintiff sued a foreign corporation in Ohio on a cause of action arising from activities entirely distinct from the corporation's activities in Ohio. Having found that the authorized representative of the corporation was physically present in the state and permitted to accept service or receive notice on the corporation's behalf, the Court stated that "there is no unfairness in subjecting that corporation to the jurisdiction of the courts of that state . . ." *Id.* at 444. The Court reasoned that if the corporation carries on, in that state, "continuous and systematic corporate activities . . . those activities are enough to make it fair and reasonable to subject that corporation to proceedings *in personam* in that state . . ." *Id.* at 445. With regard to causes of action not arising out of a corporation's activities in the forum state, the Court found "no requirement of federal due process" that prohibited the Ohio court from exercising jurisdiction and applying its law. *Id.* at 446.

Likewise in *Hague, supra*, this Court attached significance to the fact that the corporation was "at all times present and doing business" in the forum state. 449 U.S. at 317. In that case as well, the cause of action arose out-

side the forum state. Notwithstanding this fact, the Court found that the application of the forum's substantive law was constitutional, *inter alia*, on the ground that the corporation could "hardly claim unfamiliarity with the laws of the host jurisdiction and surprise that the state's courts might apply forum law to litigation in which the company is involved." *Id.* at 317-18. The Court reasoned that application of the forum law was not arbitrary or unfair, "particularly since the company was licensed to do business in [the forum], it must have known it might be sued there, and that [the forum] courts would feel bound by [forum] law." *Id.* at 317-18 (quoting *Clay v. Sun Insurance Office Ltd.*, 363 U.S. 207, 221 (1960) (Black, J., dissenting)).

Limitation statutes are designed to close the doors of a state's courts to untimely claims. This purpose is not subverted by a forum state's application of its own limitation period to an action originated in its courts. Mississippi has chosen to extend this period to six years and make it applicable to all who conduct business in the state.[9] Whether the Third Circuit approves or disapproves of the Mississippi policy is irrelevant. The wisdom of

---

[9] Mississippi's exercise of jurisdiction and its application of its law is consistent with, and necessary to, its avowed policy of treating authorized foreign corporations and domestic corporations equivalently. *See* Miss. Code Ann. § 29-1-27. As stated in *Poole v. Mississippi Publishers Corp.*, 208 Miss. 364, 44 So. 2d 467 (1950): "All foreign corporations doing business in Mississippi shall be subject to suit here to the extent that corporations of the state are, whether the cause of action accrued here or not, and this statute indicates a general policy of equality and similarity of treatment as between foreign and domestic corporations". 44 So. 2d at 473.

that policy is properly and necessarily reserved for the Mississippi legislature. The point here is that, as repeatedly recognized by this Court, the Mississippi policy does not violate the United States Constitution and therefore is not subject to amendment or rejection by the Third Circuit.

C.

The Third Circuit's Ruling Conflicts With This Court's Decisions Regarding The Purpose And Effect Of A Transfer Under 28 U.S.C. § 1404(a).

While the Third Circuit's ruling purports to depend upon a constitutional analysis outside the scope of *Van Dusen v. Barrack, supra*, the import of the decision is squarely contrary to the policy expressed in *Van Dusen*.[10]

In *Van Dusen*, this Court laid out the principles governing the effect of a transfer under 28 U.S.C. § 1404(a) on the choice of law. There the Court held that following a transfer, the transferee court is "obligated to apply the state law that would have been applied if there had been no change of venue." 376 U.S. at 639. In other words, the transferee federal court is to sit as a federal court of the transferor state and apply its law, including its choice of law rule. *Id.* at 633, 642. The Court explained that "both the history and purposes of § 1404(a) indicate that it

---

[10] The Third Circut admitted that the application of *Van Dusen* was "straight-forward" but erroneously concluded that *Hague* controlled. *Ferens*, 819 F.2d at 425. As discussed above, the court failed to recognize that *Hague* addressed the choice of substantive law only. Moreover, the court failed to acknowledge the due process contacts present in the case.

should be regarded as a federal judicial housekeeping measure . . . [designed] simply to authorize a change of courtrooms." *Id.* at 636-637.

The Court's ruling in *Van Dusen* concerning the effect of a transfer on the choice of law was based upon an analysis of the purposes of § 1404(a) and the impermissible consequences which would result from a contrary rule. 376 U.S. at 633-36. The Court recognized that § 1404(a) was enacted to promote convenience and justice. 376 U.S. at 616. If a change of law were to result from a transfer, these ends would be sacrificed and a motion to transfer could be utilized as a motion to dismiss. Moreover, the judge exercising his discretion upon a motion to transfer might well decline to grant the transfer, despite considerations of convenience, if the transfer would prejudice the plaintiffs' claim. *Id.* at 636. Such a result would impermissibly turn a remedial, judicial housekeeping statute into a method "to defeat the advantages accruing to plaintiffs who have chosen a forum which although it was inconvenient, was a proper venue." *Id.* at 634.

The Third Circuit's ruling at issue directly contravenes this analysis of the purpose and function of § 1404 (a). Under the Third Circuit's decision, substantive law, not convenience will be the determining factor in another court's decision whether to transfer a case to a federal court within the Third Circuit. Defendants will attempt to utilize the rule to gain an advantageous change in law and thereby defeat the benefits the plaintiffs were entitled to by their selection of the initial forum. Convenience and judicial economy—the purposes of § 1404(a) ac-

cording to *Van Dusen*—will give way to consideration of legal tactics.

In avoiding this "straight-forward" analysis laid out in *Van Dusen*, the Third Circuit failed to recognize that the primary case relied on by the Supreme Court as the basis for the holding in *Van Dusen* was *Headrick v. Atchison T. & S.F.R. Co.*, 182 F.2d 305 (10th Cir. 1950). *Van Dusen*, 376 U.S. at 631-33. The Supreme Court stated that *Headrick* had "adopted and applied a general interpretive principle which we belive faithfully reflects the purposes underlying § 1404(a)." 376 U.S. at 631.

Headrick is factually almost identical to this case. There the plaintiff, a Missouri citizen, filed suit in New Mexico against a Kansas corporation doing business in New Mexico for injuries received in California. The plaintiff frankly stated that he had chosen New Mexico because only there would he "not be confronted with the defense of the statute of limitations." *Headrick*, 182 F.2d at 311. The defendant moved to have the case dismissed, or in the alternative, transferred to the federal district court in California pursuant to 28 U.S.C. § 1404(a). The judge dismissed, reasoning that transfer would be futile because the suit would be barred by the California statute of limitations.

On appeal, the Tenth Circuit in *Headrick* reversed. It held that the district court erred in assuming the California statute of limitations was applicable on transfer, since the case would properly remain "a New Mexico case still controlled by the law and policy of that state." *Headrick*, 182 F.2d at 310. The court further observed, in a passage quoted with approval in *Van Dusen*, that the

plaintiff "had a legal right to select any forum where the defendant was amenable to process . . . [H]ad the case been tried in the New Mexico state court, the procedural laws of New Mexico including the statute of limitations would be applicable . . . [I]n removal cases, the federal court must apply the state law and the state policy." *Van Dusen*, 376 U.S. at 632 (quoting *Headrick*, 182 F.2d at 309).

The Court explicitly approved *Headrick's* holding concerning the applicability of the transferor state's statute of limitations in the transferee court and saw no constitutional due process problem in the state's choice of law. Yet the Third Circuit's ruling to the contrary does not even cite *Headrick*, much less distinguish it or otherwise suggest why the Court's endorsement of it should not be controlling.

Such a gap in the analysis is strong evidence of the errors in the Third Circuit's ruling. That decision must be overturned in light of its failure to follow the decisions of this Court and its inability to withstand scrutiny in light of the purposes of 28 U.S.C. § 1404(a).

D.

The Third Circuit's Ruling Conflicts With This Court's Decisions Requiring Uniformity Between Federal Courts And State Courts Sitting In The Same State.

Because the Third Circuit's holding transforms 28 U.S.C. § 1404(a) into a vehicle for affecting a change in state law, rather than a change in courtrooms, the decision

conflicts with the policies expressed in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

The Supreme Court has often summarized the *Erie* policy as "the principle of uniformity within a state." *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 496 (1941). The uniformity which *Erie* requires is between federal courts and state courts sitting in the same state. As explained in *Guaranty Trust Co. v. York*, 326 U.S. 99, 100 (1945), the "nub of the policy that underlies *Erie* . . . is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a state court a block away should not lead to substantially different results." *Id.*

The Third Circuit's ruling jeopardizes this uniformity. For example, if a case identical to the instant case is filed in a Mississippi state court and remains there, the Mississippi state court will apply the Mississippi statute of limitations and allow the action to proceed. *See Louisiana and Mississippi R. Transfer Co., supra*, 159 Miss. at 667. If, however, as actually happened in this case, a non-resident plaintiff brought the action in a Mississippi federal court and venue was transferred to a federal court within the Third Circuit, Mississippi law no longer applies and the action will be dismissed.

This incongruous result is manifestly violative of the *Erie* principle of uniformity between a Mississippi state court and a Mississippi federal court. The "accident of diversity" leads to a different result than that which would have been attained if the action were brought in a state court.

Indeed, the Court recognized the implications of *Erie* in reaching its decision in *Van Dusen*. There the court concluded that "the accident of federal diversity jurisdiction [should] not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed." 376 U.S. at 638. Accordingly, the Court held that a transfer under 28 U.S.C. § 1404(a) should be simply a change in courtrooms and no more. The Third Circuit's ruling ignores and contravenes this principle without explanation or analysis. This Court should grant certiorari to prevent the Third Circuit's ruling from jeopardizing the continued viability of 28 U.S.C. § 1404(a).

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

THOMAS P. PRESTON
(Counsel of Record)
WAYNE A. MACK, JR.
DUANE, MORRIS & HECKSCHER
1500 One Franklin Plaza
Philadelphia, PA 19102
(215) 854-6237

Attorneys for Petitioners

March 11, 1988

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1371

RICHARD KOONTZ and BARBARA ANN KOONTZ,
ADMINISTRATOR OF THE ESTATE OF
STEVEN KOONTZ, Deceased

Appellants

v.

INTERNATIONAL HARVESTER COMPANY

Appellee

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 86-1342)
(Hon. Edward N. Cahn)

Submitted Under Third Circuit Rule 12(6)
December 8, 1987

Before: GREENBERG, SCIRICA and HUNTER,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED. *See Ferens v. Deere & Co.*, 819 F.2d 423 (3d Cir. 1987).

Costs taxed against appellants.

BY THE COURT,
Anthony J. Scirica
Circuit Judge

Attest:

/s/ Sally Mrvos
Sally Mrvos, Clerk

Dec. 15, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD KOONTZ, et al.	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 86-1342
NAVISTAR INTERNATIONAL TRANSPORTATION CORPORATION	)	

ORDER

(Filed June 4, 1987)

AND NOW, this 3rd day of June, 1987, upon consideration of the opinion of our Court of Appeals in *Ferens v. Deere & Company*, No. 86-3595, slip op. (3d Cir. May 28, 1987), IT IS ORDERED that plaintiffs' motion for relief from order of dismissal is DENIED.

BY THE COURT:

/s/ Edward N. Cahn,
Edward N. Cahn, J.

Entered: 6-4-87.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD KOONTZ, et al.	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 86-1342
INTERNATIONAL HARVESTER COMPANY	)	

ORDER

(Filed Apr. 30, 1986)

AND NOW, this 29th day of April, 1986, following a telephone conference with the attorneys, IT IS ORDERED that the within case is DISMISSED without prejudice.[1]

BY THE COURT:

/s/ Edward N. Cahn
Edward N. Cahn, J.

---

[1]In a telephone conference held April 29, 1986, involving the court and both counsel, the case of White v. Malone Properties, Inc., et al. No. 55,195 (Supreme Court of Mississippi) was discussed. In that case the Supreme Court of Mississippi decided that where a "claim arose factually wholly in another state," the statute of limitations of the other state would apply even though the six year statute of limitations for tort actions in Mississippi would allow the action if it arose in Mississippi. Counsel agree that the *White* case controls the outcome of this case which has been removed from the Northern District of Mississippi to the Eastern District of Pennsylvania. Consequently, a dismissal without prejudice is in order.

Supreme Court, U.S.
FILED
MAY 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1522

(2)

In The

Supreme Court of the United States

October Term, 1987

—o—

RICHARD KOONTZ AND BARBARA ANN KOONTZ, ADMINISTRATORS OF THE ESTATE OF STEVEN KOONTZ, DECEASED,

Petitioners,

v.

INTERNATIONAL HARVESTER COMPANY,

Respondent.

—o—

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—o—

THOMAS J. FINARELLI
FRANCIS P. BURNS, III
(Counsel of Record)
SUSAN E. SATKOWSKI

GEORGE J. LAVIN, JR. ASSOCIATES
510 Walnut Street, 12th Floor
Philadelphia, PA 19106
(215) 627-0303

Attorneys for Respondent, International Harvester Company

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

1988

QUESTION PRESENTED FOR REVIEW

In a product liability action arising completely within Pennsylvania but commenced by Petitioners in Mississippi and transferred on their motion to the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1404(a), was denial of Petitioners' Rule 60(b)(6) Motion seeking relief from an Order of Dismissal justified either because Mississippi's Statute of Limitations may not be constitutionally applied to revive an action time-barred under the laws of Pennsylvania or because Petitioners' Motion was untimely, and application of the Mississippi Statute after transfer would not be in the interest of justice?

LIST OF PARTIES

Respondent is satisfied with the petitioners' list of parties to the proceeding. Pursuant to Rule 28.1 respondent states that it is now known as Navistar International Transportation Corporation, the parent company of which is Navistar International Corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
LIST OF PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW AND JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE THIRD CIRCUIT'S HOLDING IN THIS CASE IS SUPPORTED BY DECISIONS OF THIS COURT	6
II. THIS COURT NEED NOT REACH THE CONSTITUTIONAL ISSUE IN THIS CASE	9
III. THE ASSERTED CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS IS LARGELY ILLUSORY	10
IV. MISSISSIPPI LAW IS UNSETTLED AND THIS CASE IS NOT RIPE FOR REVIEW	11
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981) ... 6, 7

Browder v. Director, Department of Corrections of Illinois, 434 U.S. 257 (1978) ... 9

Brown v. Clark Equipment Company, 96 F.R.D. 166 (D. Me. 1982) ... 9

Cowan v. Ford Motor Co., 694 F.2d 104 (5th Cir. 1982), *aff'd on rehearing*, 713 F.2d 100 (5th Cir.) & 719 F.2d 785 (5th Cir. 1983) ... 5, 10, 11

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) ... 8

Ferens v. Deere & Company, 819 F.2d 423 (3d Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3249 (U.S. Sept. 21, 1987) (No. 87-477) ... 4, 5, 6, 10

Goad v. Celotex Corporation, 831 F.2d 508 (4th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3516 (U.S. Jan. 14, 1988) (No. 87-1183) ... 5, 10, 11

Headrick v. Atchison, T. & S.F. Ry. Co., 182 F.2d 305 (10th Cir. 1950) ... 8

Heavner v. Uniroyal, Inc., 63 N.J. 130, 305 A.2d 412 (1973) ... 11

Home Insurance Company v. Dick, 281 U.S. 397 (1930) ... 7

Jackson v. Jackson, 276 F.2d 501 (D.C. Cir.), *cert. denied*, 364 U.S. 849 (1960) ... 9

Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) ... 6, 7

Insurance Company of North America v. Carnahan, 446 Pa. 48, 284 A.2d 728 (1971) ... 12

Martinez-McBean v. Government of the Virgin Islands, 562 F.2d 908 (3d Cir. 1977) ... 9

TABLE OF AUTHORITIES—Continued

Page

McVicar v. Standard Insulations, Inc., 824 F.2d 920 (11th Cir. 1987) 10, 12

Perkins v. Benguet Consolidated Mining Company, 342 U.S. 437 (1952) 7

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 7

Schreiber v. Allis-Chalmers Corporation, 611 F.2d 790 (10th Cir. 1979) 10

Shewbrooks v. A. C. & S., Inc., No. 56014 slip. op. (Miss. Aug. 19, 1987) 12

United States v. Arthur Young & Company, 465 U.S. 805 (1984) 9

Van Dusen v. Barrack, 376 U.S. 612 (1964) 8

White v. Malone Properties, Inc., No. 55195, slip. op. (Miss. Mar. 12, 1986) *withdrawn* 494 So.2d 576 (Miss. 1986) 3, 11, 12

Yanow v. Weyerhaeuser Steamship Company, 274 F.2d 274 (9th Cir. 1958), *cert. denied*, 362 U.S. 919 (1960) 9

STATUTES

28 U.S.C. § 1404(a) 3, 7, 8, 10, 11

Miss. Code Ann. § 15-1-49 (1972) 3

42 Pa. Cons. Stat. Ann. § 5524 (Purdon 1982) 3

RULES OF COURT

Fed. R. Civ. P. 60(b)(6) 1, 3, 4, 5, 9, 10

OPINIONS BELOW AND JURISDICTION

Respondent is satisfied with the petitioners' presentation of the opinions below and grounds on which they seek to invoke the jurisdiction of this Court.

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to those provisions set forth in the petition, this case involves Federal Rule of Civil Procedure 60(b)(6), which provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . .
>
> (6) any other reason justifying relief from the operation of the judgment.

———o———

STATEMENT OF THE CASE

On June 9, 1979, Steven Koontz and Joel Savage were riding in a 1977 International Scout and were fatally injured in a single vehicle accident that occurred in Lower Moreland Township, Pennsylvania. The Scout was manufactured by respondent, International Harvester Company, now known as Navistar International Transportation Corporation. At the time of the accident, Steven Koontz and his parents, the petitioners here, were residents and citizens of Pennsylvania. The vehicle involved

was registered in Pennsylvania and owned by Reliable Delivery Company, Inc., located in Philadelphia.

The Estate of Joel Savage brought suit against the Estate of Steven Koontz, International Harvester Company, Reliable Delivery and John Matz Truck Service, Inc., a repair facility located in Philadelphia. Another repair facility, Standard Auto Spring Company, also located in Philadelphia, was joined as an additional defendant. In that suit[1] the plaintiffs alleged, as do petitioners in the case at bar, certain defects in design and manufacture of the Scout that allegedly caused a post-collision fire. The Philadelphia law firm of Post & Schell represented the Estate of Steven Koontz in that action. On May 19, 1983 and again on March 13, 1985, petitioners instituted suit in the Court of Common Pleas of Philadelphia against Post & Schell alleging malpractice for failure to institute timely claims against respondent for injuries sustained by their son in the 1979 accident.

On May 15, 1985 petitioners commenced this product liability action[2] against respondent in the United States District Court for the Northern District of Mississippi seeking the application of that state's statute of limita-

---

[1] Savage's estate initially filed a lawsuit against International Harvester and a separate suit against the other parties, but the suits were consolidated.

[2] The case at bar is the sixth lawsuit (including the two malpractice actions) that has arisen from the accident. It is the only suit of the six that was filed outside Pennsylvania. Respondent was sued in two of the six. In the actions commenced on behalf of the Estate of Joel Savage, Steven Koontz is identified as the driver of the Scout. In the case at bar, petitioners allege that Joel Savage was the driver.

tions. Miss. Code Ann. § 15-1-49 (1972). Under Pennsylvania law, the action was time-barred. 42 Pa. Cons. Stat. Ann. § 5524 (Purdon 1982).

On November 4, 1985, petitioners filed a motion to transfer the action to the United States District Court for the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1404(a). The motion was granted on February 12, 1986 over respondent's objection.

On March 12, 1986, the Mississippi Supreme Court rendered its decision in *White v. Malone Properties, Inc.*, No. 55195, slip op. (Miss. Mar. 12, 1986) and held that Mississippi would no longer apply its six year statute of limitations to claims that "arose factually wholly in another state, and where the center of gravity of the action lies in that other state." *White*, slip op. at 1. Citing *White*, the United States District Court for the Eastern District Of Pennsylvania entered an order of dismissal without prejudice on April 29, 1986.[3]

The Mississippi Supreme Court, acting on a petition for rehearing filed on March 27, 1986, withdrew its first opinion in *White* and substituted a revised opinion on September 24, 1986. *White v. Malone Properties, Inc.*, 494 So.2d 576 (Miss. 1986).

On April 13, 1987, almost one year after the district court's original order of dismissal and nearly seven months after the new opinion in *White*, petitioners filed a Motion for Relief under Federal Rule of Civil Procedure

---

[3] The district court's dismissal order expressly noted that "counsel agree that the *White* case controls the outcome of this case." See Appendix at 4a.

60(b)(6). Petitioners sought relief from the order of dismissal based on the substituted opinion in *White*. The motion was filed by counsel for the malpractice defendants but with the concurrence of petitioners.[4]

After briefing and a hearing, the district court entered an order on June 4, 1987 denying the rule 60(b) motion, citing *Ferens v. Deere and Company*, 819 F.2d 423 (3d Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3249 (U.S. Sept. 21, 1987) (No. 87-477). Petitioners appealed to the United States Court of Appeals for the Third Circuit and filed a Petition for Hearing En Banc, which was denied on October 1, 1987. The Court of Appeals for the Third Circuit, citing *Ferens*, affirmed the district court's ruling in an order dated December 15, 1987, 838 F.2d 461 (3d Cir. 1987) (mem.).

———o———

SUMMARY OF ARGUMENT

There are four independent grounds for denying review on certiorari in this case.

First, the Court of Appeals for the Third Circuit in *Ferens* correctly held that a state may not apply its own statute of limitations regardless of the significance of contacts between the forum and the litigation. Accordingly, the court below was correct in affirming the decision of

---

[4] Petitioners' counsel of record for purposes of the Petition for Writ of Certiorari continues to represent the malpractice defendants in the suits pending in the state court of Pennsylvania.

the district court. Moreover, the holding in *Ferens* finds doctrinal support in prior decisions of this Court.

Second, this Court need not reach the constitutional question posed by petitioners. The Court of Appeals for the Third Circuit reviewed the district court's order denying petitioners' motion under Federal Rule of Civil Procedure 60(b)(6). In the courts below, respondent contended that petitioners did not meet the requirements for relief under Rule 60(b)(6). The result reached by the court below is supported by other reasons that do not involve constitutional issues.

Third, the asserted conflict between this case and those cited by petitioners is largely illusory. Procedural differences distinguish this case from those cited by petitioners. Also, despite the difference in the due process analysis in *Ferens* as contrasted with *Goad v. Celotex Corporation*, 831 F.2d 508 (4th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3516 (U.S. Jan. 14, 1988) (No. 87-1183) and *Cowan v. Ford Motor Co.*, 694 F.2d 104 (5th Cir. 1982), *aff'd on rehearing* 713 F.2d 100 (5th Cir.) & 719 F.2d 785 (5th Cir. 1983), the circuits have not formed precise differences of opinion meriting review at this time.

Lastly, this case is not ripe for review because Mississippi law is unsettled. A substantial question exists as to whether the Mississippi Supreme Court would apply its state's statute of limitations to a case, as here, that has no contact with Mississippi apart from nominal residence of a corporate defendant engaged in interstate commerce.

———o———

ARGUMENT

I. THE THIRD CIRCUIT'S HOLDING IN THIS CASE IS SUPPORTED BY DECISIONS OF THIS COURT.

There is no connection between Mississippi and the case at bar. The decedent was a citizen of Pennsylvania and his estate was raised under Pennsylvania law. The accident occurred in Pennsylvania. The Scout was registered in Pennsylvania, sold in Pennsylvania and titled to a company located in Philadelphia. The lawsuit does not concern any business or activity that respondent conducted in Mississippi. Indeed, the pretext for filing suit in Mississippi and, in addition, seeking application of Mississippi's statute of limitations, rests exclusively upon the respondent's nominal residence in Mississippi by virtue of the fact that it is registered to do business there and has appointed a resident agent.

Relying on *Ferens*, the court below recognized that Mississippi's contact with the parties, the accident and the vehicle are so plainly insignificant that application of the Mississippi statute of limitations would be arbitrary, fundamentally unfair, and, therefore, unconstitutional. Although this same issue was not directly addressed in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), this Court there noted the considerable criticism of the traditional choice of law rule that allows a state with little or no interest in an action to apply its own statute of limitations to the controversy. *Id.* at 778 n.10 (citations omitted). Moreover, the holding in the case at bar finds specific doctrinal support in other decisions of this Court. In *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 312-13

(1981) (plurality opinion) this Court noted that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." In *Home Insurance Company v. Dick*, 281 U.S. 397 (1930), this Court refused to allow a state that had no material contacts with the case to apply its statute forbidding parties from limiting by contract the time within which suit could be brought.

In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), this Court reaffirmed the philosophy of *Dick* and *Hague*[5] and held that a state cannot apply its own law to

---

[5] Petitioners contend this Court in *Hague* applied the limitations period applicable in the forum state and attached significance to the fact that Allstate was present and did business in the forum state. However, the fact that Allstate did business in Minnesota was not the sole contact with Minnesota. The plaintiff had moved to Minnesota after the accident and her decedent had been employed in Minnesota and was killed in an accident commuting from his place of employment. Three dissenting Justices strongly disputed whether being licensed to do business in the forum had any significance at all:

> [T]he plurality finds it significant that the insurer does business in the forum State . . . The State does have a legitimate interest in regulating the practices of such an insurer. But this argument proves too much. The insurer here does business in all 50 States. The forum State has no interest in regulating that conduct of the insurer unrelated to property, persons, or contracts executed within the forum State.

Hague, 449 U.S. 337-338. (Powell, J., Burger, C.J. & Rehnquist, J. dissenting).

Petitioners also cite *Perkins v. Benguet Consolidated Mining Company*, 342 U.S. 437 (1952) but *Perkins* was a question of jurisdiction, not choice of law, and as this Court made clear in *Keeton*, these are two distinct questions. *See Keeton*, 465 U.S. at 778.

claims of class action plaintiffs having no connection with the state. Thus, contrary to the petitioners' suggestion, the Court of Appeals for the Third Circuit has not ruled in a way that conflicts with any prior decision of this Court.

Petitioners also assert the decision in the case at bar conflicts with this Court's prior decisions regarding the effect of a transfer under 28 U.S.C. § 1404(a); but in *Van Dusen v. Barrick*, 376 U.S. 612 (1964), this Court expressly left open the question of what law applies following a transfer by plaintiff under section 1404(a). *See id.* at 640 n.10.[6]

Petitioners' analysis under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) also should be rejected. They assert that the "accident" of diversity should not enable a party to achieve a result in federal court which could not have been achieved in Mississippi state court. In this regard, they contend that had they commenced suit in Mississippi state court, the case would not have been time-barred. Nevertheless, they chose the federal forum and the courts below were free to pass judgment on a federal question, the constitutionality of application of Mississippi's statute of limitations to out-of-state claims. Moreover, by initially filing suit in the Northern District of Mississippi, and then seeking transfer pursuant to 28 U.S.C. § 1404(a), petitioners sought to achieve a result in the Eastern District of Pennsylvania which could not have been achieved had

---

[6] Petitioners also argue that *Ferens* conflicts with the reasoning of *Headrick v. Atchison, T. & S.F. Ry. Co.*, 182 F.2d 305 (10th Cir. 1950) but the defendant in *Headrick* was the party who moved for transfer. Thus, *Headrick* is inapposite.

this case been instituted there or in Pennsylvania state court.

II. THIS COURT NEED NOT REACH THE CONSTITUTIONAL ISSUE IN THIS CASE.

A prevailing party may argue any ground in support of a judgment, whether or not that ground was relied upon or even considered by the court below. *United States v. Arthur Young & Company*, 465 U.S. 805, 814 n.12 (1984) (citations omitted). Although the Court of Appeals for the Third Circuit in the case at bar cited *Ferens* in its judgment order and petitioners seek a grant of certiorari on this basis, there are other reasons that would support the order and do not involve constitutional questions.

A court of appeals reviews the denial of a Rule 60(b) motion only for abuse of discretion. *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257, 263 n.7 (1978) (citations omitted). In both the district court and on appeal in the Third Circuit, respondent maintained that petitioners' motion was being used as a substitute for an untimely appeal, *Martinez-McBean v. Government of the Virgin Islands*, 562 F.2d 908, 911 (3d Cir. 1977) and was not filed within a reasonable time as required by Rule 60(b). *Yanow v. Weyerhaeuser Steamship Company*, 274 F.2d 274 (9th Cir. 1958), *cert. denied*, 362 U.S. 919 (1960). Further, respondent asserted that a mere change in decisional law does not constitute "extraordinary circumstances" as required by Rule 60(b)(6), *Brown v. Clark Equipment Company*, 96 F.R.D. 166, 173 (D. Me. 1982) and respondent would have been prejudiced if the case were reopened. *Jackson v. Jackson*, 276 F.2d 501

(D.C. Cir.), *cert. denied*, 364 U.S. 849 (1960). Each of these reasons independently supports the result reached by the court below.

III. THE ASSERTED CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS IS LARGELY ILLUSORY.

None of the cases cited by petitioners as in conflict with the decision in this case involve a plaintiff-initiated change of venue under 28 U.S.C. § 1404(a)[7] or the denial of a Rule 60(b) motion. These procedural differences distinguish this case and render petitioners' asserted conflict largely illusory.

Moreover, two of the circuits identified by petitioners as holding views contrary to *Ferens* did not explore due process limitations on choice of law determinations. The Court of Appeals for the Eleventh Circuit in *McVicar v. Standard Insulations, Inc.*, 824 F.2d 920 (11th Cir. 1987) did not discuss any constitutional question, but instead, based its decision on 28 U.S.C. § 1404(a). The Court of Appeals for the Tenth Circuit in *Schreiber v. Allis-Chalmers Corporation*, 611 F.2d 790 (10th Cir. 1979), gave no attention to the relationship between due process considerations and choice of law decisions. *See id.* at 794.

Admittedly, *Cowan* and *Goad* conflict with the due process analysis in *Ferens*, but on closer examination, nei-

---

[7] In *Goad*, the case was transferred over plaintiffs' objection. *Goad*, 813 F.2d at 509. *Schreiber* also was transferred on defendant's motion. *Schreiber*, 611 F.2d at 791-92. Ford did not file a motion to transfer in *Cowan*. *Cowan*, 713 F.2d at 103 n.5. The opinion of the Court of Appeals for the Eleventh Circuit in *McVicar* is silent on which party initiated transfer. *McVicar*, 824 F.2d at 920.

ther *Cowan* nor *Goad* attempt to defend as rational a rule that allows a forum state having no interest in a case to routinely apply its own statute of limitations. In both cases, the courts hearkened back to the substantive-procedural distinction.[8] *See Goad*, 831 F.2d at 512-13; *Cowan*, 694 F.2d at 107. The court in *Goad* also did not consider how the rule it espoused serves the "interest of justice" under 28 U.S.C. § 1404(a).

The circuit courts have not given concentrated attention to the precise issue raised by petitioners and therefore, there is no clearly defined conflict meriting review at this time.

IV. MISSISSIPPI LAW IS UNSETTLED AND THIS CASE IS NOT RIPE FOR REVIEW.

In its substituted opinion in *White*, the Mississippi Supreme Court issued a narrow holding based on Louisiana's worker's compensation laws. *See White*, 494 So.2d at 577-79. Importantly, however, the court did not say

---

[8] In *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 305 A.2d 412 (1973), the New Jersey Supreme Court rejected the traditional approach in favor of a "significant contacts" analysis:

> We are convinced the time has come, for the reasons previously outlined, to discard the mechanical rule that the limitations law of this state must be applied in every suit on a foreign cause of action. We need go no further now than to say that when the cause of action arises in another state, the parties are all present in and amenable to the jurisdiction of that state, New Jersey has no substantial interest in the matter, the substantive law of the foreign state is to be applied, and its limitation period has expired at the time suit is commenced here, New Jersey will hold the suit barred.

305 A.2d at 418.

that the analysis in its original opinion was incorrect and expressly left open for future consideration any reiteration or modification of application of the six-year statute of limitations to a non-resident defendant. Further, in his concurring opinion, Justice Robertson, author of the withdrawn majority opinion, does not indicate that his colleagues rejected the broader implications of the original analysis. *White* thus can reasonably be read as indicating that the Mississippi Supreme Court is concerned with the application of its statute to corporate defendants involving claims arising solely outside of Mississippi, but has chosen to leave the broader question for another day.

A more recent but as yet unpublished decision of the Mississippi Supreme Court, *Shewbrooks v. A. C. & S., Inc.*, No. 56014 slip. op. (Miss. Aug. 19, 1987),[9] further suggests that the Mississippi Supreme Court remains troubled by its "generous statute of limitations [that] make [its] court highly attractive to dilatory plaintiffs and forum-shoppers." *Shewbrooks*, slip. op. at 4. The court noted further that "we are not eager to see Mississippi become a dumping ground for the nation's homeless litigation." *Id.* at 5.[10]

---

[9] A petition for rehearing was filed in *Shewbrooks* on September 14, 1987 and has not yet been ruled on by the court.

[10] Pennsylvania law further complicates the analysis. A Mississippi Court would decline to apply Pennsylvania's statute of limitations only if that statute is, under the law of Pennsylvania, procedural in nature. *McVicar v. Standard Insulations, Inc.*, 824 F.2d 921-922 (11th Cir. 1987). Pennsylvania cannot be easily assigned to the group of states that view statutes of limitations as strictly procedural and, as such, easily discarded when resolving conflicts of law problems. *See Insurance Company of North America v. Carnahan*, 446 Pa. 48, 284 A.2d 728, 730 (1971).

Pivotal matters of state law are unsettled and the issues in this case might be resolved in future cases without the need for constitutional interpretation. Accordingly, respondent submits that it would be premature to consider in this case the broad constitutional issue raised by petitioners.

———o———

CONCLUSION

For the foregoing reasons, respondent requests that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit be denied.

Respectfully submitted,

THOMAS J. FINARELLI
FRANCIS P. BURNS, III
(Counsel of Record)
SUSAN E. SATKOWSKI

GEORGE J. LAVIN, JR. ASSOCIATES
510 Walnut Street, 12th Floor
Philadelphia, PA 19106
(215) 627-0303

Attorneys for Respondent,
International Harvester Company

May 5, 1988